Federal Court Cour fédérale

Date: 20200812

Dockets: IMM-3943-19
IMM-3946-19

Citation: 2020 FC 823

Ottawa, Ontario, August 12, 2020

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

MATUSSALA MANDELA MANNINGS

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Mr. Matussala Mandela Mannings, [Mr. Mannings], brings two Applications for Judicial Review [the Applications], which have been consolidated, challenging the decisions of a Minister's Delegate, made pursuant to subsection 44(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. The Minister's Delegate found that there are reasonable grounds to believe that Mr. Mannings is inadmissible to Canada pursuant to paragraph 36(1)(a) of the Act, due to serious criminality, and also inadmissible pursuant to

paragraph 37(1)(b), due to transnational organized crime, based on his conviction and sentence for importing cocaine. The Minister's Delegate referred him to the Immigration Division for an admissibility hearing.

[2] The Minister's Delegate considered the respective "Case Review and Recommendation" Reports [the Report(s)] of the Inland Enforcement Officer [the Officer] of the Canada Border Services Agency [CBSA] made pursuant to subsection 44(1) of the Act, along with the documentation and evidence relied on by the Officer. The Minister's Delegate concurred with the Officer's recommendations that Mr. Mannings may be inadmissible to Canada pursuant to paragraphs 36(1)(a) and pursuant to paragraph 37(1)(b) of the Act and provided brief additional reasons with respect to both grounds for referring him for an admissibility hearing.

[3] Mr. Mannings argues that both decisions are unreasonable because the Officer, and in turn, the Minister's Delegate, failed to reasonably assess important humanitarian and compassionate [H&C] factors, in particular his establishment in Canada, his rehabilitation, and the country conditions in Guyana. With respect to the referral based on paragraph 37(1)(b), Mr. Mannings also argues that the Officer breached procedural fairness.

[4] For the reasons that follow, the Applications are dismissed. The Minister's Delegate reasonably found that there were reasonable and probable grounds to believe that Mr. Mannings is inadmissible to Canada pursuant to both paragraphs 36(1)(a) and 37(1)(b). The rationale for the recommendations reflects that the Officer and Minister's Delegate considered the important

H&C factors but reasonably found that these were not outweighed by the seriousness of the criminal conduct.

[5] With respect to the referral arising from paragraph 37(1)(b), there was no breach of procedural fairness. The Officer advised Mr. Mannings at the interview that other grounds of inadmissibility may be considered. Mr. Mannings was fully aware of the information underlying his potential inadmissibility due to transnational organized crime as it arose from his criminal conviction, which was based on his guilty plea and acceptance of all the facts. No further disclosure was required. He was given the opportunity to make submissions about why he should not be referred for an admissibility hearing on this ground and he did so. Although he argues that he was precluded from making legal submissions on the application of paragraph 37(1)(b), there is no evidence to support this assertion, nor did he attempt to submit any legal arguments. He acknowledged that he was invited to make submissions on any relevant information. Moreover, the Officer's recommendation and the Minister's Delegate's referral are not final decisions about his inadmissibility. The Immigration Division [ID] will determine Mr. Manning's admissibility and he will have a further opportunity to make submissions at that hearing.

I. Background

[6] Mr. Mannings is a permanent resident of Canada and citizen of Guyana. He arrived in Canada in 2006 sponsored by his father.

[7] On April 7, 2017, he entered a guilty plea and was convicted of importing a controlled substance (cocaine) contrary to subsection 6(1) of the *Controlled Drugs and Substances Act*. He

was sentenced to the time he had served in pretrial custody, which was 568 days, representing a sentence of 768 days. This sentence appears to reflect the application of an approximately 1.5 credit to the time served.

[8] The Officer's Reports recount the circumstances of the offence based on the police records and criminal court proceedings. Briefly, in September 2014, the CBSA inspected a package containing approximately 963 grams of cocaine arriving into Canada concealed in a fruit puree and placed a tracking device on it. The package was accepted by Tasha Roussel, who signed for the package using a different name and delivered the package to Mr. Mannings. Mr. Mannings took the package and fled to avoid the police at the scene. He dropped the package and ran a short distance before being arrested.

[9] On October 23, 2017, Mr. Mannings was advised by the CBSA that there were reasonable grounds to believe that he was inadmissible to Canada pursuant to paragraph 36(1)(a) of the Act. He was invited to make submissions "providing why a removal order should not be sought" and to provide "details relevant to [his] case" including, but not limited to, among other things, his age upon arrival, courses taken, family and community support, and degree of hardship if removed. Mr. Mannings' Counsel made submissions to the CBSA on January 22, 2018.

[10] On March 12, 2018, CBSA sent a letter to Counsel for Mr. Mannings inviting Mr. Mannings to an interview concerning his inadmissibility.

[11] Mr. Mannings recounts that he attended the interview on March 27, 2018 without Counsel based on his Counsel's view that the interview would focus only on his inadmissibility due to serious criminality and to save the expense of counsel.

[12] On April 23, 2018, the CBSA advised Mr. Mannings that there were also reasonable grounds to believe that he was inadmissible to Canada pursuant to paragraph 37(1)(b) of the Act. He was again invited to make submissions.

[13] In June 2018, the new Counsel for Mr. Mannings corresponded with the CBSA requesting disclosure of the basis for the paragraph 37(1)(b) grounds, citing the duty of fairness owed. CBSA refused, noting that disclosure would be provided if a referral pursuant to paragraph 37(1)(b) were made to the Immigration Division.

[14] On July 16, 2018, Counsel for Mr. Mannings again requested disclosure as well as a 30-day extension to make submissions, pending a response to their Access to Information and Privacy request.

[15] On June 25, 2018 and August 8, 2018, the CBSA contacted Mr. Mannings reminding him that the final deadline for him to make H&C submissions was August 30, 2018.

[16] On August 30, 2018, Mr. Mannings provided his submissions.

[17] On October 9, 2018, the Minister's Delegate signed the subsection 44(2) reports, which set out her recommendation and referral to the ID. Mr. Mannings explains that he was unaware that he had been referred for an admissibility hearing until August 9, 2019, when he received the Reports in response to his application for *mandamus* seeking to have a decision made. Mr. Mannings notes that the ID has not yet scheduled his admissibility hearing and has no record of the referrals.

II. The Decisions Under Review

A. *The Officer's Report and Minister's Delegate's recommendation pursuant to paragraph 36(1)(a) (serious criminality)*

(1) The Officer's Report

[18] The Officer's Report (dated October 5, 2018) is organized under several headings: Nature of the Inadmissibility (ies), Humanitarian and Compassionate Factors and Other Information, Recommendation and Rationale, and List of Attachments.

[19] With respect to the Nature of the Inadmissibility, the Officer noted the information from the transcript of the Ontario Superior Court of Justice with respect to Mr. Mannings' criminal conviction and sentencing, including the street value of the cocaine, estimated at $77,040 CAD. The Officer also noted that Mr. Mannings testified that the facts outlined to the Court were accurate.

[20] With respect to H&C Factors and Other Information, the Officer acknowledged the support letters, including those from Mr. Mannings' father, brother and sister.

[21] The Officer also acknowledged Mr. Mannings' submission that he had completed Grade 10 and additional courses while in prison and his stated intention to complete high school; and, he was currently working at "House of Metals". The Officer observed that Mr. Mannings continued to receive social assistance, but had stated that he had recently advised the proper authorities of his employment. The Officer acknowledged Mr. Mannings' statement that he provides 400 Euros to his daughter, who lives outside Canada, and $300 to his mother, who lives in Guyana, each month. The Officer also noted that Mr. Mannings does not own a home or vehicle and has several debts.

[22] With respect to Mr. Mannings' submissions about his rehabilitation, the Officer referred to Mr. Mannings' affidavit, which described his involvement with Ms. Roussel in importing cocaine from Trinidad and Tobago, and his acceptance of responsibility for willingly involving himself in a serious criminal offence.

[23] However, the Officer noted that at his March 27, 2018 interview, Mr. Mannings stated that Ms. Roussel "called me and say for me to just help her to receive a box. . . she said that she have a box she wants me to hold onto and then she came and just drop it off to my school" [*sic*]. When asked about the tracking number, he denied knowing anything and suggested it was placed in his backpack and that "the cops that was in charge of this case wanted to nail me." [*sic*]. The

Officer added that when asked why he pled guilty, Mr. Mannings indicated that his lawyer arranged a deal.

[24] The Officer acknowledged Mr. Mannings' assertion that he, his girlfriend and his family members would all experience hardship if he were removed. The Officer also noted the submissions made regarding the adverse country conditions, including economic hardship in Guyana.

[25] Under the heading Recommendation and Rationale, the Officer again noted that Mr. Mannings had been convicted of a serious criminal offence and received a relatively lengthy sentence.

[26] The Officer found that Mr. Mannings' conflicting statements – at the interview and in his affidavit and in Court – about whether he accepted responsibility for the offences called his credibility into question. The Officer was unable to conclude that Mr. Mannings "may be considered to be rehabilitated".

[27] The Officer acknowledged that Mr. Mannings would experience a period of separation and transition if returned to Guyana, as his girlfriend and family members reside in Canada. However, the Officer found that the effect would be temporary and that he could continue to provide some measure of support to his family, as well as to his daughter. The Officer found that his other family members in Guyana could provide him with some measure of support on his return.

[28] The Officer also acknowledged that Mr. Mannings had been employed and had been a reggae musician in Guyana and in Canada. The Officer was not satisfied that Mr. Mannings could not resume his music career in Guyana.

[29] The Officer found that the H&C factors did not outweigh the seriousness of Mr. Mannings' criminality and opined that the issuance of a warning letter would not be appropriate. The Officer recommended that Mr. Mannings be referred for an admissibility hearing.

(2) The Minister's Delegate's Determination

[30] The Minister's Delegate reviewed the Officer's Report on October 9, 2020, concurred with the Officer's recommendation and provided brief additional reasons. The Minister's Delegate concluded that it would not be appropriate either to issue a warning letter or not to refer Mr. Mannings to the ID for an admissibility hearing.

B. *The Officer's Report and Minister's Delegate's recommendation pursuant to paragraph 37(1)(a)*

(1) The Officer's Report

[31] The Officer's report regarding Mr. Mannings' inadmissibility pursuant to paragraph 37 (1)(b) sets out the same information under the respective headings in the Report as in the Report pursuant to paragraph 36(1)(a).

[32] The Officer noted that on April 23, 2018, Mr. Mannings had been invited to make submissions explaining why he should not be referred for an admissibility hearing on the paragraph 37(1)(b) ground and did so after several extensions for the receipt of submissions were granted. The Officer noted that, ultimately, Mr. Mannings relied on the same H&C submissions provided with respect to paragraph 36(1)(a).

[33] In the Recommendation and Rationale, the Officer found that the available evidence supported the reasonable grounds to believe that Mr. Mannings engaged in transnational organized crime, which was the importation of cocaine. The Officer again noted Mr. Mannings' conviction, lengthy sentence, the circumstances of the offence, and his inconsistent account of why he pleaded guilty. The Officer was unable to conclude that Mr. Mannings was rehabilitated.

[34] With respect to H&C factors, the Officer reiterated the comments and conclusions as in the Officer's Report regarding paragraph 36(1)(a).

[35] The Officer was not persuaded that the H&C factors outweighed the seriousness of Mr. Mannings' involvement in transnational organized crime. The Officer again acknowledged that if found inadmissible, Mr. Mannings would have no right of appeal to the IAD.

(2) The Minister's Delegate's Determination

[36] The Minister's Delegate reviewed the Officer's Report on October 9, 2020, concurred with the Officer's assessment and recommendation and provided brief additional reasons. The

Minister’s Delegate concluded that issuing a warning letter or not making a referral would not be appropriate options in the circumstances.

III. Issues and Standard of Review

[37] Mr. Mannings submits that the Minister’s Delegate’s decisions to refer him to the ID for an admissibility hearing pursuant to paragraphs 36(1)(a) and 37(1)(b) are both unreasonable.

[38] Mr. Mannings also submits – with respect to the referral pursuant to paragraph 37(1)(b) – that the Officer breached procedural fairness and, as a result, the referral by the Minister’s Delegate should be quashed.

[39] The standard of review of the Officer’s Report and recommendation and the Minister’s Delegate’s recommendation is reasonableness (*Canada* (*Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10, [2019] SCJ No 65 [*Vavilov*]).

[40] In *Vavilov*, the Supreme Court of Canada provided extensive guidance on what constitutes a reasonable decision, and on the conduct of a reasonableness review. A hallmark of a reasonable decision remains that the decision is justified, transparent and intelligible (at paras 99-100).

[41] A reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with respectful attention, seeking to understand the reasoning process followed by the decision maker to arrive at a conclusion. A reasonable decision is one

that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker (*Vavilov*, at paras 105-110).

[42] The Officer's Report is considered to be part of the Minister's Delegate's reasons (*Burton v Canada (Minister of Public Safety and Emergency Preparedness)*, 2018 FC 753 at para 16, 295 ACWS (3d) 825).

[43] Issues of procedural fairness are reviewed on the standard of correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339). As noted in *Canadian Pacific Railway Co v Canada (Attorney General)*, 2018 FCA 69 at para 34, [2018] FCJ No 382 (QL), correctness is not so much a standard of review as a finding that where a breach of procedural fairness is found, no deference is owed to the decision maker.

[44] The Court must first consider the scope of the duty of procedural fairness owed in the context of a section 44 report and then consider whether that duty was breached as alleged by Mr. Mannings.

IV. The Applicant's Submissions

A. *Paragraph 36(1)(a)*

[45] Mr. Mannings argues that the Minister's Delegate's decision to refer him for an admissibility hearing pursuant to paragraph 36(1)(a) is not reasonable for several reasons.

[46] First, Mr. Mannings submits that the Officer erred by not applying the guidelines in the Enforcement Manual regarding section 44 Reports. He submits that ENF 6 directs Officers to consider several factors including age at landing, length of residence, family support, conditions in the home country, criminality and degree of establishment. He argues that the Officer only considered some of these factors.

[47] Mr. Mannings also points to ENF 5, Section 8.3, which sets out factors for an Officer to consider when preparing a report arising from serious criminality. Mr. Mannings argues that the Officer did not take into account that he had no prior convictions, and that he has had no further involvement in criminal activities, rather focussed exclusively on his conviction for importing cocaine.

[48] Second, Mr. Mannings submits that the Officer failed to consider important H&C factors – in particular his rehabilitation, establishment in Canada and the conditions in his home country. He argues that in accordance with *McAlpin v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 422 [*McAlpin*], read in light of *Vavilov*, a more comprehensive assessment of H&C factors is required and that the reasons of the Officer and Minister's Delegate must reflect the chain of analysis, and must explain why factors are rejected.

[49] Mr. Mannings argues that the Officer erred in focussing on his criminal conviction without considering crucial evidence of his rehabilitation. He submits that the Officer ignored that he has only one conviction and failed to consider the reasons of the sentencing judge which

noted mitigating factors and his potential for rehabilitation, which resulted in a shorter than average sentence for the offence.

[50] Mr. Mannings submits that the Officer also failed to consider his degree of establishment, noting that he has been in Canada for 14 years, has family connections and support and has been involved in the music scene and community.

[51] Mr. Mannings argues that the Officer also failed to consider the country conditions in Guyana, including the lack of economic opportunity, widespread poverty, weak healthcare system, extensive crime and violence and ineffective policing in Guyana.

[52] Third, Mr. Mannings argues, more generally, that the Officer and Minister's Delegate failed to recognize and exercise their wide discretion not to recommend referral to an admissibility hearing. He submits that the wording of sections 44(1) and (2) – "is of the opinion", "may prepare a report", and "may refer the report" – signals that officers have broad discretion.

B. *Paragraph 37(1)(b)*

[53] Mr. Mannings argues that the Officer's recommendation and Minister's Delegate's referral based on his inadmissibility pursuant to paragraph 37(1)(b) is unreasonable for the same reasons noted above. In addition, he argues that the Officer erred by not providing distinct reasons and by not conducting a legal analysis regarding the applicability of paragraph 37(1)(b). He argues that in accordance with *Vavilov*, a decision-maker has a greater responsibility to provide detailed reasons when the impact of the decision on the individual's rights are severe. He

submits that, in addition to the requirement to reasonably assess his H&C submissions, the Officer and MD must conduct a reasonable assessment of the threshold issue – whether the elements of paragraph 37(1)(b) have been established.

[54] Mr. Mannings further argues that the Officer breached his right to procedural fairness in three ways, which cumulatively and individually require that the referral be quashed.

[55] First, Mr. Mannings submits that the Officer failed to advise him that his inadmissibility pursuant to paragraph 37(1)(b) would be considered at the time he was invited for an interview regarding the paragraph 36(1)(b) ground. He submits that he would not have waived his right to attend with counsel if he knew this ground would be canvassed.

[56] Second, Mr. Mannings submits that the Officer failed to disclose the particulars of his potential inadmissibility pursuant to paragraph 37(1)(b), despite his repeated requests, which made it impossible for him to respond to the April 23, 2018 letter inviting him to make submissions why a removal order should not be sought on this ground.

[57] Third, Mr. Mannings submits that the Officer erred by restricting his submissions to H&C factors. He submits that inadmissibility pursuant to section 37 requires proof of its constituent elements, and that the Officer prevented him from making legal submissions, and in so doing, the Officer fettered his or her discretion.

[58] Mr. Mannings further submits that, as a remedy for this breach, the referral should be quashed and the Court should order a stay of proceedings, which would prevent the CBSA from pursuing this ground of inadmissibility.

V. The Respondent's Submissions

[59] The Respondent notes that a referral pursuant to section 44 is not a final decision regarding inadmissibility (*Sharma v Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FCA 319 at para 29 [*Sharma*]).

[60] The Respondent submits that although the Officer and Minister's Delegate may have discretion not to recommend referral to an admissibility hearing, this does not render the two decisions to refer Mr. Mannings to the ID unreasonable. Given that Mr. Mannings had been convicted of a serious offence, demonstrated a lack of remorse and attempted to evade responsibility, there was ample basis for the Minister's Delegate to refer him for an admissibility hearing on both grounds.

[61] The Respondent submits that the Officer's discretion to consider H&C factors is limited (*McAlpin* at para 70 and *McLeish v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 705 at paras 74-86 [*McLeish*].

[62] The Respondent submits that the Officer reasonably assessed the H&C factors in the rationale for the recommendation and did not ignore any important H&C factors. The Respondent submits that the evidence of Mr. Mannings' rehabilitation was not persuasive, nor

were his establishment and family ties or the country conditions in Guyana when considered in the context of the seriousness of the offence.

[63] The Respondent notes that although Mr. Mannings stated in his affidavit that he accepted responsibility for his conduct and promised to rehabilitate himself and that he pleaded guilty and accepted the facts supporting his plea in the criminal court, he told a different story in his interview with the Officer. Mr. Mannings sought to deny any knowledge of importing drugs with Ms. Roussel, and indicated that he entered a plea as part of a plea agreement. The Respondent submits that Mr. Mannings' inconsistent story substantially undercut his promise of rehabilitation and assertions of remorse.

[64] The Respondent further submits that there was no breach of procedural fairness, noting that the section 44 stage attracts minimal participatory rights (*Slemko v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 718 at para 30; *Lin v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 862 at para 18 [*Lin*]).

[65] The Respondent submits that there is no requirement for an Officer to interview a permanent resident or foreign national with respect to the preparation of a subsection 44(1) report.

[66] The Respondent notes that the transcript of the March 2018 interview reveals that the Officer cautioned Mr. Mannings that he had the right to counsel and that he was not obliged to say anything, but that anything he said could be used as evidence. The Officer advised

Mr. Mannings that the investigation into his inadmissibility could include other grounds. The Officer also noted that the interview was to gather information and repeatedly indicated that he or she had not formed a final opinion on Mr. Mannings' inadmissibility at that time.

[67] The Respondent adds that the Officer did not determine whether to pursue inadmissibility pursuant to 37(1)(b) until nearly a month later, at which time, the Officer sent Mr. Mannings the subsection 44(1) report with respect to paragraph 37(1)(b). Mr. Mannings was given several opportunities, including extensions of time, to provide written submissions in response.

[68] The Respondent submits that an officer's only disclosure obligation is to disclose information that is material and otherwise unknown and unavailable to the permanent resident or foreign national (*Jeffrey v Canada (Minister of Public Safety and Emergency Preparedness,* 2019 FC 1180 at para 30 [*Jeffrey*]).

[69] The Respondent acknowledges the *obiter* comments of the Court in *Durkin v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 174 [*Durkin*] and *Jeffrey* suggesting that it may be more efficient for the CBSA to provide disclosure on request, but points out that the decisions at issue predate *Durkin* and *Jeffrey*. Moreover, in the present case, Mr. Mannings knew the basis for his possible inadmissibility pursuant to paragraph 37(1)(b).

[70] The Respondent disputes that the Officer fettered his or her discretion noting that Mr. Mannings was not precluded from making any submissions he wished to provide, as he was invited to do.

[71] The Respondent submits that in the event that the Court were to find that the referral made pursuant to paragraph 37(1)(b) is unreasonable or results from procedural unfairness, the proper remedy is to remit the matter for redetermination. The Respondent submits that the criteria for a stay of proceedings have not been met.

VI. The Minister's Delegate's Determination to Refer Mr. Mannings for an Admissibility Hearing on Both Grounds is Reasonable

[72] The starting point to address Mr. Mannings' submissions that the referrals are not reasonable is to put the section 44 process in context. The statutory provisions are set out in ANNEX A.

[73] In *Sharma*, the Federal Court of Appeal stated that while a report under 44(1) and referral under 44(2) "are important in the sense that they trigger the process that may ultimately strip the appellant of his permanent residency, they are of no immediate and practical consequence for the appellant."

[74] As explained in the jurisprudence (for example, *Sharma* at para 29*, Lin* at paras 10-13) a recommendation and referral at the section 44 stage is not a final decision. The section 44 process is to determine, based on the Officer's opinion and Minister's Delegate's review of that opinion, whether the foreign national or permanent resident should be referred to the ID for an admissibility hearing. The Officer and Minister's Delegate do not determine admissibility. The ID makes the determination of admissibility and submissions on factual and legal issues can be made at that stage.

[75] The Officer and Minister’s Delegate have two choices – to issue a warning letter or to refer the permanent resident or foreign national to the ID for an admissibility hearing. The permanent resident or foreign national is invited to make submissions on why the referral should not be made, which may include H&C factors. These submissions along with the other relevant information, inform the Officer and Minister’s Delegate.

[76] The current jurisprudence confirms that Officers and Minister’s Delegates have a limited discretion to consider H&C factors. Officers are not required to consider H&C factors in making their recommendation nor are Minister’s Delegates required to consider H&C factors in determining whether to refer a permanent resident or foreign national for an admissibility hearing (*McAlpin* at para 70, *McLeish* at paras 74-75). In *McAlpin*, the Chief Justice explained what is expected of Officers and Minister’s Delegates where they do consider H&C factors in making a recommendation and setting out their rationale.

[77] In *McAlpin*, the Chief Justice considered the guidance provided in *Sharma*, *Canada (Minister of Citizenship and Immigration) v Bermudez*, 2016 FCA 131 and *Cha v Canada (Minister of Citizenship & Immigration)*, 2006 FCA 126, [2006] FCJ No 491 [*Cha*], and the different purposes of section 44 and section 25 of the Act. The Chief Justice acknowledged some uncertainty in the jurisprudence regarding the scope of the discretion of an officer and Minister’s delegate’s to consider H&C factors and, at para 70, refined the principles previously set out in *Melendez v Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FC 1363 to provide more clarity.

[78] The Chief Justice reiterated that the discretion to consider H&C factors under section 44 is <u>very</u> limited and there is no obligation on the officer to consider such factors. However, the Chief Justice explained that if the Officer and/or Minister's Delegate do consider H&C factors, their assessment must be reasonable <u>in the circumstances,</u> at para 70:

> 4. However, where H&C factors are considered by an officer or by a ministerial delegate in explaining the rationale for a decision that is made under subs. 44(1) or (2), the assessment of those factors should be reasonable, <u>having regard to the circumstances of the case</u>. Where those factors are rejected, an explanation should be provided, even if only very brief in nature.
>
> 5. In this particular context, a reasonable assessment is one that at least takes account of the most important H&C factors that have been identified by the person who is alleged to be inadmissible, <u>even only by listing those factors, to demonstrate that they were considered.</u> A failure to mention any important H&C factors that have been identified, when purporting to take account of the H&C factors that have been raised, may well be unreasonable.
>
> [My emphasis]

[79] As noted by the Respondent, specific questions regarding the scope of discretion at the section 44 stage were certified *in Surgeon v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1314, *Lin*, and *Cheng v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1318. If answered by the Court of Appeal, additional guidance or certainty will be provided.

[80] However, in the present case, the issue is not the scope of this discretion but about whether the Officer and Minister's Delegate reasonably considered the important H&C factors in making the recommendation and referral. Clearly, the Officer and the Minister's Delegate did exercise their discretion to consider the relevant H&C factors.

[81] Mr. Mannings submits that *McAlpin* must now be read in light of *Vavilov* and, as a result, the reasons of the Officer and MD must be held to a higher standard to show that the referral is justified, intelligible and transparent. In my view, *Vavilov* guides Courts to adapt the principles to the context. The context of a section 44 report, which is an opinion and recommendation, does not demand more detailed reasons than noted in *McAlpin*. Recall that in *Vavilov,* at paras 102-105, the Supreme Court of Canada noted that a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and the law that constrain the decision maker.

[82] As elaborated on below, the reasons of the Officer and Minister's Delegate explain why the recommendations and referrals were made and justify the findings that there are reasonable grounds to believe that Mr. Mannings is inadmissible to Canada with reference to the relevant factors, including the H&C factors.

A. *Paragraph 36(1)(b)*

[83] Contrary to Mr. Mannings' submission, the Officer did not fail to consider the factors set out in the ENF manual. First, the ENF manual is not the law (*Sharma* at para 46), rather, the ENF manual provides guidance to Officers in preparing reports pursuant to Section 44. Second, the Officer's Report demonstrates that he or she addressed the relevant factors. The Officer noted Mr. Mannings age and that he had arrived in Canada in 2006. The Officer acknowledged Mr. Mannings' submissions regarding his establishment, including his employment and music, his family situation and responsibilities and the conditions in Guyana. The Officer also noted the

seriousness of Mr. Mannings' offence, his criminal history and his inconsistent statements regarding his role in the offence.

[84] The Officer did not ignore the guidance in ENF 5, which sets out factors to consider where serious criminality is the issue. The Officer's Reports addressed all the relevant factors: whether rehabilitation is imminent and likely to be favourable; prior criminal offences; criminal or organized criminal activities; actual sentence; circumstances of the incident; and whether the conviction involved violence or drugs.

[85] Contrary to Mr. Mannings' submissions, neither the Officer nor the Minister's Delegate ignored important H&C factors. Rather, they found that the mitigating factors were not outweighed by the seriousness of the offence. The Officer's Rationale and Recommendation captures the key factors that were also noted under other headings of the Report. As noted in *Sharma* at para 23, at the section 44 stage, the Officer and Minister's Delegate's focus is on security and not on H&C considerations, as these can be addressed in other applications (where applicable). This reflects Parliament's intention to make public safety and security a priority in the Act, as noted in its objectives (section 3).

[86] The Officer noted that Mr. Mannings had been convicted of a serious criminal offence, received a relatively lengthy sentence and that the sentencing judge had commented on the harm caused by cocaine.

[87] The Officer also found that Mr. Mannings' conflicting statements – at the interview and in his affidavit and in Court – on whether he accepted responsibility for the offences called his credibility into question.

[88] Although Mr. Mannings argues that crucial evidence of his rehabilitation was ignored, the evidence consists only of Mr. Mannings' submissions that recite his own affidavit and letters of support from family members stating that he will or has changed. The Officer reasonably found that he was not persuaded about the promises of rehabilitation due to Mr. Mannings' inconsistent statements, particularly at his interview where he depicted his role in the offence differently, denied his active involvement, and indicated that he entered a guilty plea to secure his release from jail based on the time already served. Mr. Mannings made other comments at the interview, including that he made a mistake (which appears to relate to why he liaised with Ms. Roussel) and in one exchange, stated that he was remorseful, but his comments as a whole do not detract from the Officer's conclusion about the lack of persuasive evidence of rehabilitation.

[89] Contrary to Mr. Mannings' submissions, the Officer did not ignore the sentencing judge's reasons. Although Mr. Mannings submits that the sentencing judge noted mitigating factors and his potential for rehabilitation, which resulted in a sentence lower than the trend for the importation offence, the Officer found that a relatively lengthy sentence had been imposed and noted that the sentencing judge commented about the sophistication of the importation scheme and the harm caused by cocaine. The Officer was not required to reach the same conclusion regarding Mr. Mannings' potential for rehabilitation given that the Officer's role is very different

from that of the sentencing judge. Moreover, the sentencing judge’s reasons are brief and note both aggravating factors and mitigating factors and the sentence imposed reflected a joint submission of the Crown and Counsel for Mr. Mannings.

[90] The Officer did not ignore that Mr. Mannings had no prior convictions, but reasonably noted that he was on bail at the time of the importation offence for other similar drug offences, which were stayed due to the delay in proceeding to trial.

[91] The Officer also did not ignore the evidence of Mr. Mannings’ establishment, which was scant. The Officer considered that he had been employed, had family ties in Canada and family obligations and that he had been active in the reggae music scene. The Officer also recognized that Mr. Mannings would experience a period of separation and transition if returned to Guyana.

[92] The Officer was not required to conduct a more detailed assessment of the country conditions in Guyana. The Officer stated that he or she had considered all the submissions and information on file and there is no reason to doubt that the Officer did so. In addition, the Officer’s rationale notes that Mr. Mannings has family in Guyana and after a period of transition could re-establish himself, which signals that the Officer was not persuaded that the country conditions were a significant mitigating factor.

[93] The reasons of the Minister’s Delegate specifically noted that she found that the threshold of reasonableness for inadmissibility pursuant to paragraph 36(1)(a) had been met. The Minister’s Delegate found that while there were some mitigating H&C factors (noting

employment, family support and length of time in Canada), the act of organizing and orchestrating the importation into Canada of illegal substances has a serious impact on society. The Minister's Delegate reasonably concluded that it would not be appropriate to issue a warning letter and that a referral should be made.

B. *Paragraph 37(1)(b)*

[94] The Officer's recommendation and the Minister's Delegate's determination that there were reasonable grounds that Mr. Mannings was inadmissible pursuant to paragraph 37(1)(b) is also reasonable for the same reasons noted above.

[95] Mr. Mannings submits that the consequences of inadmissibility due to transnational organized crime are greater, and more comprehensive reasons are required, in particular to address the elements of paragraph 37(1)(b). I do not agree that distinct or additional reasons were required. The submissions made by Mr. Mannings in response to CBSA's letter of April 23, 2018, regarding the paragraph 37(1)(b) ground asked the Officer to consider the same H&C submissions previously made with respect to the paragraph 36(1)(a) ground. The submissions did not raise any new information that would have called for different reasons. The Officer specifically found that there were reasonable grounds to believe that Mr. Mannings was inadmissible due to transnational organized crime. The overall conclusion of the Officer remained that the mitigating factors did not outweigh the seriousness of the offence.

[96] In the Minister's Delegate reasons, she stated that she was satisfied that that the threshold of reasonable grounds to believe that Mr. Mannings was inadmissible pursuant to paragraph

37(1)(b) had been met. The Minister's Delegate noted that she had considered the H&C factors and the submissions made as well as the information on the file. She noted the negative impact if Mr. Mannings were removed, including the adjustment for his family, his "restart" and his reintegration without his family, but found that these were not insurmountable obstacles. The Minister's Delegate also noted that a serious consideration was that the referral would result in the loss of the right of an appeal if found inadmissible. However, she found that Mr. Mannings' recent conviction and lack of remorse or acceptance were unfavourable. The Minister's Delegate reasonably concluded that it would not be appropriate in the circumstances to issue a warning letter and that a referral should be made.

[97] Contrary to Mr. Mannings' submissions, I do not agree that the Minister's Delegate failed to consider whether the requirements of para 37(1)(b) had been established. She clearly addressed the threshold, albeit briefly. I note that the ID will determine whether the elements of transnational organized crime have been established to support a finding of inadmissibility on this ground.

[98] Although Mr. Mannings may want a different interpretation of the evidence and more weight placed on the H&C factors than on the seriousness of his criminality, the weight to attach to relevant factors is for the Officer and Minister's Delegate to assess.

[99] The reasons of both the Officer and Minister's Delegate convey why the recommendations and referrals were made. The Rationale of the Officer demonstrates that H&C factors were reasonably assessed, but the seriousness of Mr. Mannings' criminality was the

significant factor. The recommendation is justified, transparent and intelligent in relation to the facts and the law governing section 44. The Minister's Delegate's additional reasons demonstrate that she or he considered the relevant factors and explained why the referral was made, again emphasizing the seriousness of the criminality.

VII. The Officer and Minister's Delegate did not breach the duty of procedural fairness owed in the circumstances

[100] In *Sharma*, at para 34, the Federal Court of Appeal noted that "a relatively low degree of participatory rights is warranted in the context of subsections 44(1) and (2)." The Court of Appeal noted the factors that inform the scope of the duty of procedural fairness, as established in *Baker v Canada (Minister of Citizenship & Immigration)*, 1999 SCC 699, and focussed on the requirements that the person be informed of the facts that triggered the process and be given the opportunity to make submissions.

[101] In the present case, there was no breach of procedural fairness arising from the Officer's conduct or the process.

[102] As noted by the Respondent, there is no duty to conduct an interview. Nor does the permanent resident or foreign national have a right to be interviewed. An interview – if held – is to gather information. Mr. Mannings was invited to an interview following notice regarding his potential inadmissibility pursuant to paragraph 36(1)(a). At the interview, he was advised that the purpose was to gather information and that other grounds of inadmissibility could be considered. Mr. Mannings was fully aware of his conviction for the importation of cocaine and the

surrounding circumstances. The determination to pursue inadmissibility on the ground of transnational organized crime was made later and Mr. Mannings was advised of that additional ground and invited to make submissions in response.

[103] Although Mr. Mannings submits that he would have attended the interview with counsel if he had known that other grounds of inadmissibility would be considered, his own evidence at the interview was that he attended without counsel to save costs and because he thought it would be a “normal” interview. In response to the Officer’s questions regarding why Mr. Mannings pleaded guilty – given that Mr. Mannings was quite evasive about his role in the importation of cocaine with Ms. Roussel – Mr. Mannings noted that he wanted to attend the interview by himself. He stated, “I didn’t want to come with a lawyer because I don’t want him to sugar coat anything for you; okay? . . . and know that I am remorseful for whatever decision I have made in the past . . .”.

[104] There was no breach of procedural fairness due to the CBSA’s refusal to provide further disclosure of the particulars regarding the paragraph 37(1)(b) ground of inadmissibility.

[105] As noted by the Chief Justice in *Jeffrey* at paras 30 and 33, where similar arguments were addressed, at the section 44 stage a permanent resident or foreign national is only entitled to receive disclosure of information that is material and otherwise unknown to him.

[106] The Chief Justice also noted at para 31:

> [31] Parliament has specifically provided, in sections 3 and 26 of the I.D. Rules, that the appropriate time at which disclosure of

> other relevant information should be made to him is after a decision has been made to hold an admissibility hearing.

[107] The Chief Justice reiterated this point at para 35:

> [35] Insofar as other information in the Officer's possession is concerned, sections 3 and 26 of the I.D. Rules explicitly contemplate that the disclosure of other information, beyond that described immediately above, is only required to be made after a decision to hold an admissibility hearing has been made.

[108] The comments of Justice Barnes in *Durkin* (at paras 31-32), suggesting that the CBSA could be more forthcoming in providing disclosure, are *obiter* and do not impose a greater obligation on the CBSA to do so, particularly where the information is already held by the permanent resident. As noted in *Jeffrey*, any further disclosure obligation would arise only after the Minister's Delegate makes a referral to the ID.

[109] Contrary to Mr. Mannings' argument that he received no "particularized" notice of the grounds and no disclosure, he was advised by letter dated April 23, 2018, attaching the report, which noted that he could be inadmissible "for having engaged in organized crime that is transnational in nature, namely, the unauthorized importation of cocaine to Canada." He was invited to make submissions about why a removal order should not be made.

[110] Mr. Mannings had pleaded guilty and had admitted the facts underlying his conviction to import cocaine from Trinidad and Tobago. Given that he was fully aware of his conviction and all the circumstances of the offence, he knew the "case to be met". Further disclosure was not

required and would not have provided any material information that was unknown to him (*Jeffrey* at paras 30, 33).

[111] As noted in the letter of response by the CBSA, further disclosure would be provided if a referral were made. This reflects the Immigration Division Rules (sections 3 and 26) as noted in *Jeffrey* at paras 31, 35.

[112] The Officer did not fetter his/her discretion by asking for H&C submissions. I would suggest that officers should be more precise and consistent in their correspondence with permanent residents or foreign nationals regarding the nature of the submissions, but this lack of precision does not rise to a breach of procedural fairness. As noted, Mr. Mannings was advised by the April 23, 2018 letter to make submissions on why a removal order should not be issued. The examples noted included, but were not limited to, H&C factors. The later correspondence focussed on H&C factors, but did not preclude other submissions. Counsel indicated that he wished to make legal submissions, but did not do so, although he acknowledged that the letter of April 23, 2018, stated that any relevant information could be provided and would be considered.

[113] Mr. Mannings will also have the opportunity to make submissions, including on the legal requirements for a finding of inadmissibility pursuant to paragraph 37(1)(b), at an admissibility hearing before the ID.

[114] The allegations of Mr. Mannings either individually or cumulatively do not amount to a breach of procedural fairness.

VIII. Conclusion

[115] Given my findings that the decisions of the Minister's Delegate to refer Mr. Mannings to the ID for an admissibility hearing on both grounds are reasonable and that there was no breach of procedural fairness, there is no need to address Mr. Mannings' submission that a stay of process with respect to his inadmissibility pursuant to paragraph 37(1)(b) is warranted.

<u>JUDGMENT in files IMM-3943-19 and IMM-3946-19</u>

THIS COURT'S JUDGMENT is that:

1. The Applications for Judicial Review are dismissed.

2. No question for certification was proposed and no question arises.

"Catherine M. Kane"

Judge

ANNEX A

IX. The Relevant Statutory Provisions

Serious criminality	**Grande criminalité**
36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	**36 (1)** Emportent interdiction de territoire pour grande criminalité les faits suivants
(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;	a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;
37 (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for	**37 (1)** Emportent interdiction de territoire pour criminalité organisée les faits suivants :
(a) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern; or	a) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle se livre ou s'est livrée à des activités faisant partie d'un plan d'activités criminelles organisées par plusieurs personnes agissant de concert en vue de la perpétration d'une infraction à une loi fédérale punissable par mise en accusation ou de la perpétration, hors du Canada, d'une infraction qui, commise au Canada, constituerait une telle infraction, ou se livrer à des activités faisant partie d'un tel plan;
(b) engaging, in the context of	b) se livrer, dans le cadre de la

transnational crime, in activities such as people smuggling, trafficking in persons or laundering of money or other proceeds of crime.

criminalité transnationale, à des activités telles le passage de clandestins, le trafic de personnes ou le recyclage des produits de la criminalité.

[…]

[…]

Loss of Status and Removal
Report on Inadmissibility

Perte de statut et renvoi
Constat de l'interdiction de territoire

Preparation of report

Rapport d'interdiction de territoire

44 (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.

44 (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

Referral or removal order

44 (2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.

Suivi

44 (2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-3943-19 AND IMM-3946-19
STYLE OF CAUSE:	MATUSSALA MANDELA MANNINGS v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
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